judiciary.[7] Although this assertion may rest in part on a theory that the constitution has granted to the judiciary only judicial powers,[8] it seems generally due to the repetition of a dictum by federal judges on their refusal to render a judgment which would be subject to revision by the executive department.[9] If it is proper for the judiciary to decline to perform any but judicial functions, it must also be proper for the executive to decline to perform aught but executive functions, and for the legislature to refuse to do anything not in its essence legislative. And consequently, if it is true that some functions of government do not properly fall within any particular department, either the constitutional machinery is hopelessly inadequate or this theory of limitation of departmental activity must fall.

It is inconceivable that the introduction into our constitutions of the theory of the separation of powers makes it possible that any function of government must remain unexercised because of difficulty in ascertaining to which department it properly belongs. Certainly the judiciary cannot, with propriety, decline to perform a duty attempted to be imposed upon it, unless the department to which that duty belongs is definitely ascertained to be one other than the judicial.[10] The Appellate Division of the Supreme Court of New York has recently sustained the constitutionality of a statute which imposed on the courts the duty of rendering decisions on disputed election ballots, counting all the ballots cast, and issuing an order which should supersede the regular election returns. *Metz* v. *Maddox*, 105 N. Y. Supp. 702. Although this statute imposes duties which differ in many respects from those ordinarily performed by courts, it does not seem possible to attribute those duties with certainty to either the executive or the legislative departments. It is therefore conceived that the true theory of the separation of powers supports the assumption of this burden by the judiciary.[11]

NATURE OF THE INTEREST CREATED BY AGREEMENTS RESTRICTING THE USE OF REALTY. — It is admittedly law that an agreement restricting the use of land is enforceable in equity. But the true nature of the right acquired is as yet unsettled. It has been likened to a combination of a specifically enforceable contract and a constructive trust,[1] and compared with a warranty of title [2] and with a negative easement. It has many points of resemblance to this last, though not rising to the dignity of a true legal easement. In neither case has the owner of the dominant estate any right to do an act on the servient; and in both the right should properly arise by covenant and not by grant.[3] It has been argued that a right of property is destroyed by a restrictive agreement and belongs to no one; but this is no more true than in the case of a negative easement. If there is an agreement not to build,

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[7] In the Matter of the Application of the Senate, 10 Minn. 78.

[8] The Constitution of the State of New York does not expressly confide the judicial power to the courts.

[9] Note to Hayburn's Case, *supra*.

[10] State *v.* Bates, 96 Minn. 110.

[11] *Cf.* Citizens Bank *v.* Town of Greenough, 173 N. Y. 215; Forsythe *v.* City of Hammond, 68 Fed. 774; Robinson *v.* Kerrigan, 90 Pac. 129 (Cal.); Somerset *v.* Hunterdon, 52 N. J. L. 512.

[1] See 5 HARV. L. REV. 274.

[2] See 17 HARV. L. REV. 174.

[3] See Fry, J. in Dalton *v.* Angus, 6 App. Cas. 740, 771.

neither the promisor nor the promisee can build on the promisor's land; if there is an easement for lateral support, neither the owner of the servient nor the owner of the dominant tenement can excavate on the servient. But the right is not destroyed; it is merely divided, since either can act with the other's consent. The benefit of such a covenant passes to the purchaser of the covenantee's land whether he knew of the covenant or not,[4] and the covenantor is free from all liability as soon as he conveys away his land.[5] The land is bound in the hands of subsequent grantees, underlessees,[6] or mere occupiers,[7] with notice; or even, it is believed, in the hands of one who has acquired the title by adverse possession.[8] Moreover, such agreements have been held to create interests in land within the statute of frauds.[9] The fineness of the distinction between these rights and negative easements is further indicated by the fact that a covenant not to obstruct lights will create a legal easement,[10] while a covenant not to build beyond a certain line will not.

The question whether the right created by a restrictive agreement is a property right, was presented in a recent case of eminent domain proceedings, in which the court refused to allow the owner of such a right compensation, on the ground that he had no common law easement. *Wharton* v. *United States*, 153 Fed. 876 (C. C. A., First Circ.). Even if these rights are not true common law easements, practically the only distinction, as we have seen, is that they are enforceable only in equity, and consequently can be extinguished by a sale to a *bona fide* purchaser. Therefore, at the present time, when the differences between law and equity have been so greatly diminished, and when the registry acts give constructive notice, there seems to be no valid reason why such rights should not be held property rights, equitable rights only, to be sure, but still property. At all events, when land subject to restrictive agreements is taken by eminent domain, in justice, and on analogy to cases of inchoate dower,[11] it seems clear that the government should pay the owner of the quasi-servient estate its value when discharged of the easement, and that he, in turn, should account to the owner of the quasi-dominant for a just share of the compensation received. For the same reasons it follows that if the owner sells the land to a *bona fide* purchaser he should account for a share of the proceeds, since he has received the full value of the land unencumbered, and has destroyed at least an equitable property right.

RECENT CASES.

ATTORNEYS — DUTIES ATTACHED TO THE OFFICE — ORDER TO PAY UNENFORCEABLE OBLIGATION. — A solicitor wrote to his client's former solicitors that the client had placed in his hands the full amount of their bill, so that he

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[4] See Rogers *v.* Hosegood, [1900] 2 Ch. 388, 406.
[5] Hall *v.* Ewin, 37 Ch. D. 74.
[6] Johns Bros. *v.* Holmes, [1900] 1 Ch. 188.
[7] Mander *v.* Falke, [1891] 2 Ch. 554.
[8] *Re* Nisbet and Potts Contract, [1906] 1 Ch. 386.
[9] Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.) 72; Rice *v.* Roberts, 24 Wis. 461. The cases seemingly opposed are based on principles of fraud or estoppel. See Lennig *v.* Ocean City Ass'n, 41 N. J. Eq. 606, 609.
[10] Ladd *v.* Boston, 151 Mass. 585.
[11] Moore *v.* City of New York, 8 N. Y. 110; Wheeler *v.* Kirtland, 27 N. J. Eq. 534.